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SUBJECT: GEORGIA TACKLES CHILD PORNOGRAPHY

11. Summary: In an effort to protect children from sexual exploitation, Georgia is working to criminalize online child exploitation, building upon its recent aggressive legislative and enforcement efforts which resulted in Tier I status for Georgia in the 2007 United States Government's Annual Report on Trafficking in Persons. Consistent with their demonstrated commitment to protecting vulnerable individuals from exploitation, a committee of Georgian government officials -- including representatives from the Office of the Public Prosecution Service (OPP) and the Georgian National Communications Commission (NCC), the Georgian FCC -- the largest Georgian Internet Service Provider (ISP), United Nations Children's Fund (UNICEF) representatives, and international experts -- Department of Justice Attorneys (DOJ), Sheila Phillips, Program Manager, Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and Alexandra Gelber, Trial Attorney, Child Exploitation and Obscenity Section, and UNICEF Child Protection expert Kerry Neal -- recently worked with Georgian experts to complete draft legislation to more expansively combat child pornography. This legislation, compliant with international standards and best practices, initiates Georgia's efforts to comprehensively address the global scourge of child pornography, specifically including internet child pornography. First, it punishes -- by imprisonment, fine, and deprivation of civil rights -- any individual who intentionally receives, possesses, offers, distributes, accesses or produces child pornography. Second, it creates a specialized unit to investigate and detect child pornography and exploitation crimes. Third, it imposes an obligation upon ISPs to report internet child pornography and assist law enforcement with such investigations. Fourth, it creates a public list of convicted child pornography offenders and requires organizations, whether voluntary or paying, that involve children to examine it prior to employing a person. Fourth, it provides a general measure of assistance to child witnesses and victims. Finally, it provides the foundation for future legislation and enforcement efforts which address other internet-based crimes. End Summary.

When You Wish Upon a Star -- An Idea is Born

12. In order to build upon Georgia's success in achieving Tier I status, Georgia Resident Legal Advisor (RLA) Roger Keller and OPP developed a three-step program to combat child pornography and exploitation in Georgia based on the recognition that Georgians, primarily, use child pornography and do not produce it. First, a committee of interested NGOs and government officials would meet to identify specific child pornography and exploitation problems in Georgia. Second, Post RLA would convene a panel of experts to draft legislation addressing those problems and ensure that Georgia is compliant with international standards including provisions advocated by the UN and Council of Europe. Finally, Georgian law enforcement officials would be trained in computer technology, including computer forensics, to investigate and prosecute these

crimes.

Hi Ho, Hi Ho It's Off to Work We Go

¶3. In May, Post RLA and the OPP hosted a meeting of interested NGOs and public officials. The NGOs suggested that child pornography and exploitation problems exist in Georgia; however, the problem's scope is largely unknown because of the absence of public awareness, hidden family or individual pride, and a lack of a common understanding of what constitutes child pornography. Like the absence of knowledge concerning trafficking in persons in Georgia, they concluded that the problem's scope would not be fully understood until the OPP begins to proactively investigate and prosecute individuals. The participants noted that the OPP has not prosecuted a child pornography case in at least 5 years. They suggested that legislation concerning this issue should: (1) define child pornography; (2) involve the public; and (3) rehabilitate victims.

¶4. Work group participants also met with Members of Parliament and NCC officials in an effort to garner support for legislative action. Both the relevant Members of Parliament and the NCC readily offered to nominate staff members to participate in the legislation drafting work group. Furthermore, they identified issues the legislation should address. For example, a Member of Parliament suggested that the legislation should protect and rehabilitate child pornography victims. Likewise, the NCC officials recommended that the legislation should protect individual privacy from potential government abuse and individuals who accidentally access child pornography. NCC's chairman also said that prosecutions should expressly be limited to individuals intentionally accessing child pornography.

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¶5. Finally, on September 24, 2007, the work group, in a digital video conference (DVC) with DOJ officials and America on Line (AOL) representatives, discussed investigative requirements and ISP regulations. The DOJ participants outlined the U.S. enforcement structure, and highlighted facets that could be used in the Republic of Georgia. Experts also discussed how computer forensic evidence is crucial in proving intentional transportation, possession and accessing of child pornography. AOL's representatives explained how the company complied with the U.S. laws that require that ISPs report known child pornography and how they assisted law enforcement. AOL highlighted the fact that it only saves available historical ISP traffic for an extended period of time when requested by law enforcement officials. Thus, expensive equipment upgrades - - a constant fear expressed by the ISP representative - - are unnecessary. Furthermore, AOL does not monitor its subscriber traffic. Instead, it voluntarily established a system for its subscribers to submit complaints about individuals abusing the system. Several of these complaints have provided leads to internet child pornography cases. Finally, both law enforcement officials and AOL indicated that combating internet child pornography requires government and private industry cooperation. Based on the ISP's inclusion in the work group, the U.S. experts believed the Georgians were off to a good start.

Whistle While You Work

¶6. Based on this series of meetings, the work group members determined that the draft legislation should: (1) clearly define child pornography; (2) remain sufficiently flexible to adjust to technological changes; (3) punish only acts intentionally involving child pornography; (4) make information readily available to the public; (5) protect both child pornography victims and witnesses; and (6) help to protect and assist child pornography and exploitation victims. Furthermore, the legislation should be consistent with international standards and best practices to satisfy Georgia's current and future international obligations. During the week of October 8, 2007, the work group, using draft

legislation OPP's representative prepared, addressed these issues and completed draft anti-child pornography and exploitation legislation.

17. First, the work group defined child pornography. NCC's representative recommended that the definition should not include adults portraying minors because including such material might infringe upon a film director's artistic efforts, for example, to portray certain acts in films. Likewise, he requested an exception for individuals using pictures for medical purposes. U.S. experts noted that such depictions would not constitute child pornography in the U.S. The U.S. definition of child pornography requires that the material depict someone under the age of 18 engaging in sexually explicit conduct. They also noted that the definition of sexually explicit conduct used in the UN Convention on Cybercrime and the Council of Europe's recent Convention on Child Exploitation, is specific enough to exclude images used for medical purposes from being considered child pornography. UNICEF representatives, however, urged the Georgians to adopt a definition that criminalized adults portraying minors - a provision that has been held by the US Supreme Court to be unconstitutional unless the image is deemed to be obscene. The US Supreme Court indicated that such language would potentially criminalize Hollywood productions such as the "Titanic" that depicted adults playing minors engaged in sexual conduct. UNICEF representatives noted that the United Nations Convention on Child Exploitation defines child pornography to include adults portraying minors. However, they suggested defining child pornography in the explanatory notes to allow the local community to determine whether artistic portrayals of adults pretending to be minors engaged in sexual conduct constitutes child pornography. Both UNICEF representatives and U.S. experts ultimately suggested that the Georgians could adopt the Council of Europe's definition of sexual conduct because the Council of Europe's definition, which is identical to the definition used in the US, is limited to depictions of sexual acts or material that lasciviously displays a minor's genital area and would not criminalize images used for medical purposes. The Council of Europe's definition of child pornography also criminalizes images that depict individuals who are indistinguishable from real or actual minors which would allow for prosecution of digital images where the identity and age of the persons depicted are unknown. The work group concluded that these definition changes reflected their intent. Moreover, these definitions are sufficiently broad to provide the necessary flexibility as technology develops.

18. Second, the work group addressed the challenge of distinguishing intentional and unintentional child pornography acts. NCC and the ISP representatives claimed that individuals, including the government, might infect a person's computer with a computer virus and use the virus to access child pornography. Having infected the

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computer with child pornography, unsavory law enforcement officials, for example, seeking to discredit an anti-government journalist, would use the planted child pornography to search the entire computer, including articles that reflected unfavorably on the government. The work group quickly concluded that only intentional efforts to access child pornography should be punished. The draft legislation reflects this conclusion in that it expressly provides that only intentional conduct is punished, and the government bears the burden to prove that the accused acted intentionally. As to the NCC and ISP concerns, the U.S. experts noted that evidence of the computer virus would remain on the computer. Consequently, investigators would find evidence to support the accused person's argument that he did not intentionally access child pornography. Moreover, as to concerns directed at law enforcement, the group concluded that this legislation was not the place to address illegal efforts by law enforcement to violate the law. Instead, the courts would be the correct venue to curb illegal law enforcement activity.

19. Third, the work group struggled with determining what information should be publicly available. The work group decided that the Ministry of Internal Affairs (MOIA) would maintain a list of individuals convicted of child pornography crimes. However, what information should the public be allowed to access? For example,

UNICEF's expert noted that the United Kingdom obliges organizations to request information from a public register to establish that a potential employee has not been convicted of a child pornography or exploitation crime. This information, however, is not generally available to the public. U.K. officials were concerned that widely disseminating this information would invite vigil ante violence. By contrast, in the United States, various agencies maintain lists of individuals convicted of crimes and make the information widely available to the public. Ultimately, the work group melded both examples. It decided that MOIA's list should be maintained on its website with access to the public. However, the information will only include a person's name, date of birth, date of conviction, and penalty leveled against him. This will allow the public to identify individuals in their neighborhoods who have been convicted of such crimes and limit the possibility of vigil ante violence. Furthermore, the work group imposed a record keeping requirement on organizations involving children. These organizations will have to demonstrate that they examined the list and determined that anyone in their employ, whether paid or volunteer, has not been convicted of a child pornography or exploitation crime.

¶10. Fourth, the ISP representative proved helpful in addressing the obligations imposed on the service providers. He readily conceded that the ISPs should cooperate with law enforcement during an investigation. However, he did not believe that the ISPs should be responsible for saving or providing information it is technically not cable of providing. In other words, the ISP should not be required to invest large amounts of money to obtain or save information law enforcement officials claim is theoretically available. The work group conceded that this seemed fair and only required the ISP to provide information if it was technically able to do so. Moreover, law enforcement officials will not be granted unlimited access to the ISP's system. In the United States, law enforcement officials routinely digitally copy the content of several servers belonging to an ISP when searching for incriminating evidence. The ISP representative suggested that this would provide law enforcement officials with access to information not involved in the case, but which might be useful for political reasons. Instead, he suggested that, other than instances in which the ISP is a target of an investigation, the ISPs should be responsible for providing the law enforcement officials with the requested information. Finally, the work group concluded that the ISPs are only liable if they intentionally fail to report evidence of child pornography or exploitation. They are not responsible for searching for or creating a system that allows them to detect such information.

¶11. Finally, the work group tackled the need to protect child pornography and exploitation victims and witnesses from further victimization and public humiliation. Consistent with the interests of child victims, UNICEF and DOJ experts suggested that the legislation might penalize press organizations who disclose the victim or witness's identity. Furthermore, the legislation should allow the court and various child advocacy agencies to remove a child from an abusive atmosphere. The work group agreed with both of these proposals. First, the draft legislation specifically prohibits press agencies from disclosing a victim or witness's identity. If an agency does this after a court enters an order prohibiting such conduct, the press will be subject to fines and possible imprisonment up to 30 days. Moreover, if an organization does this prior to such a court order, the organization may be fined an amount, based on a sliding scale, to deter such future activity. Finally, the legislation allows the court, child advocacy agency, or such other state agency to remove a child from an abuse situation; however, the legislation does not dictate where the child must be placed. Instead, it leaves this decision up to the court and the

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child's various representatives.

First Star to the Right and Straight on 'til Morning

¶12. Completing the draft legislation does not complete the work group's efforts. The legislation also requires the MOIA to train and equip a special unit to detect and investigate child pornography. This means that the Government of Georgia will need to obtain computers and train investigators how to use them to detect child pornography and exploitation crimes. Additionally, MOIA will need to teach a cadre of experts forensic investigating and questioning skills with child victims. Finally, the work group will need to respond to questions from the interested NGO and Members of Parliament not involved in drafting the legislation. The draft legislation, however, represents Georgia's initial attempt to comprehensively address child pornography and exploitation issues, including the real possibility of prosecution, currently found in Georgia.

¶13. Comment. Achieving Tier I status demonstrates that Georgia has made great strides to protect vulnerable individuals. It means that powerful individuals cannot use the law to exploit vulnerable victims. Instead, Georgia's efforts demonstrate that the law shields the weak and extends the sword to the exploiters. In short, achieving Tier I status demonstrates the growth of the Rule of Law in Georgia. Extending this sword to child pornographers and the shield to the children further demonstrates the Rule of Law's continued development. Child pornography and exploitation is a scourge on society. It uses a community's most vulnerable victims - children - and wears at a community's moral fiber. Criminalizing the receipt, possession, offering, distribution, or production of child pornography empowers prosecutors to protect another vulnerable group of individuals and to attack their exploiters. This demonstrates to the public, in a meaningful way, how the Rule of law can improve an ordinary citizen's life by holding accountable individuals who believe power and/or wealth entitle them to use and abuse weaker citizens. End Comment.

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